## Ricky ak Gundah v Chairman Education Service Commission

HIGH COURT (KUCHING) — KCH-13NCvC-11/6 OF 2015
RHODZARIAH BUJANG J
25 JANUARY 2016

*Administrative Law — Disciplinary proceedings — Seeking order to quash findings — Applicant absent without leave — Respondent conducted disciplinary proceedings and dismissed applicant from his role as teacher — Whether court has right to review seriousness of misconduct — Whether applicant's misconduct warrant dismissal — Whether respondent should give counselling before dismissing applicant*

The applicant served as a headmaster for a school in Baram, Miri ('the Baram school') and then, he was transferred to another school in Merdang, Samarahan ('the Samarahan school') also as headmaster. During his tenure as a headmaster at the schools, he was absent without leave for 122 days. In his letter dated 7 October 2013, the applicant explained that the reason for his absence was because he was under emotional stress and also, he was attending meetings, briefings, courses or sick leave. Nevertheless, respondent dismissed the applicant for being absent without leave for a record number of 122 days. The applicant filed the present application for judicial review to quash the said decision by the respondent and for an order to reinstate him to his position together with his back wages or salaries for the period following his dismissal and to date. The applicant submitted that he was not given any counselling before the dismissal and that he was not given an opportunity to appeal in accordance with Schedule 3 of the Public Officers (Conduct and Discipline) Regulations 1993 after the dismissal. The applicant also submitted that there was irregularity related to the non-verification of his days of absence in the Baram school by the Baram District Education Officer. On the other hand, the respondent submitted that the applicant failed to account for his 122 days of absence during his tenure as a headmaster at the schools.

**Held**, dismissing the application with costs of RM500:

(1) It is trite law that the right to review is only accorded to the decision making process and not the decision itself. The court is entitled, upon reviewing the said process to determine if the impugned decision to dismiss was one which was reasonable. In the present case, the best tribunal to judge the seriousness of the misconduct of a public servant like the applicant herein was the respondent itself, being the body entrusted with and having powers over the appointment and/or dismissal of teachers like the applicant (see paras 8–9).

(2) Absence from work must only with leave or for official reasons which must strictly apply to all, without exceptions, no matter how far-flung or remote the place of service maybe. For the applicant to simply just up and leave without his application for leave being approved was a conduct totally unbecoming of a public servant which rightly should neither be condoned nor tolerated. With regard to the issue of no counselling given to the applicant, the applicant had failed to show to the court on the provisions of the general orders which required for counselling before dismissal (see para 10).

(3) The non-verification of the applicant's days of absence in the Baram school by the Baram District Education Officer was not an irregularity of a sufficient magnitude or impact to impugn the decision of the respondent in dismissing the applicant. The applicant's 96 days of absence at the Baram school, which record of absence had been verified was so serious a breach of discipline that in itself enough to warrant his dismissal (see para 12).

**[Bahasa Malaysia summary**

Pemohon berkhidmat sebagai guru besar untuk sebuah sekolah di Baram, Miri ('sekolah Baram') dan kemudiannya, dia ditukarkan ke sekolah lain di Merdang, Samarahan ('sekolah Samarahan') juga sebagai guru besar. Sepanjang tempoh perkhidmatannya sebagai guru besar di sekolah-sekolah, dia tidak hadir tanpa kebenaran selama 122 hari. Dalam suratnya bertarikh 7 Oktober 2013, pemohon menjelaskan bahawa alasan bagi ketiadaannya adalah kerana dia berada di bawah tekanan emosi dan juga, dia telah menghadiri mesyuarat-mesyuarat, taklimat, kursus atau cuti sakit. Namun begitu, responden memecat pemohon kerana tidak hadir tanpa kebenaran untuk 122 hari yang direkodkan. Pemohon memfailkan permohonan ini untuk semakan kehakiman bagi membatalkan keputusan tersebut oleh responden dan untuk satu perintah untuk mengembalikannya kepada kedudukan bersama-sama dengan gaji terdahulu atau gaji sepanjang tempoh pemecatannya hingga kini. Pemohon berhujah bahawa dia tidak diberikan sebarang kaunseling sebelum pemecatan dan bahawa dia tidak diberi peluang untuk merayu menurut Jadual 3 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 selepas pemecatan. Pemohon juga berhujah terdapat ketidakseragaman berkaitan dengan ketaksahan hari-hari ketiadaannya di sekolah Baram oleh Pegawai Pelajaran Daerah Baram. Pada masa yang sama, responden berhujah bahawa pemohon gagal untuk mengambil kira 122 hari ketiadaannya sepanjang tempoh perkhidmatannya sebagai guru besar di sekolah-sekolah.

**Diputuskan**, menolak permohonan dengan kos sebanyak RM500:

(1) Undang-undang terpakai adalah bahawa hak untuk membuat semakan semula hanya diberikan kepada proses membuat keputusan dan bukannya keputusan itu sendiri. Mahkamah berhak, setelah menyemak

proses tersebut untuk menentukan sekiranya keputusan yang dipersoalkan untuk pemecatan adalah munasabah. Dalam kes ini, tribunal yang terbaik untuk menilai keseriusan salah laku penjawat awam seperti pemohon di sini adalah responden sendiri, sebagai badan yang diamanahkan dengan dan mempunyai kuasa berhubung pelantikan dan/atau pemecatan guru seperti pemohon (lihat perenggan 8–9).

(2) Ketidakhadiran kerja perlulah hanya dengan kebenaran atau atas sebab-sebab rasmi yang secara ketat terpakai kepada semua, tanpa pengecualian, tidak kira berapa jauh terpencil atau jauh tempat perkhidmatan. Bagi pemohon untuk sekadar bangun dan meninggalkan tanpa permohonan bagi kebenaran yang diluluskan adalah kelakuan yang sama sekali tidak wajar bagi seorang penjawat awam dan sama sekali tidak boleh diabaikan atau ditolerasi. Berhubung dengan isu tiada kaunseling diberikan kepada pemohon, pemohon gagal menunjukkan kepada mahkamah berkenaan peruntukan perintah am yang diperlukan untuk kaunseling sebelum pemecatan (lihat perenggan 10).

(3) Ketaksahan hari-hari ketiadaan pemohon di sekolah Baram oleh Pegawai Pelajaran Daerah Baram bukanlah satu ketidakteraturan magnitud atau kesan yang mencukupi untuk meragui keputusan responden memecat pemohon. 96 hari ketakhadiran pemohon di sekolah Baram yang merekodkan ketidakhadiran telah disahkan begitu serius sehingga pelanggaran disiplin itu sendiri cukup untuk mewajarkan pemecatannya (lihat perenggan 12). ]

**Notes**

For cases on seeking order to quash findings, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 30–31.

**Cases referred to**

*Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149, FC (refd)
*Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153, FC (refd)
*Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605, FC (refd)
*Regina v Deputy Industrial Injuries Commissioner Ex parte Moore* [1965] 1 QB 456, CA (refd)
*Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, CA (refd)

**Legislation referred to**

Criminal Procedure Code
Evidence Act 1950
Public Officers (Conduct and Discipline) Regulations 1993 Schedule 3

*Jimmy Maja (Maja & Assoc) for the applicant.*
*Mohd Taufik bin Mohd Yusoff (Senior Federal Counsel, Sarawak Attorney*

*General's Chambers) for the respondent.*

**Rhodzariah Bujang J:**

**[1]** The applicant was a teacher for many years before he was dismissed on 25 February 2014 by the respondent for being absent without leave for a record number of *122 days,* though not in one stretch. In actual fact in the two charges preferred against him in the disciplinary proceedings held by the respondent, the total number of such absence was *184 days* ie 96 days and 88 days respectively but considering that the applicant was able to justify his absence for the difference in the two sets of cumulative days, it was reduced to the said 122 days. The applicant's last posting and prior to his dismissal was that of a Headmaster in Sekolah Kebangsaan St Martin, Merdang, Samarahan ('the Samarahan school') and just before that transfer a Headmaster for a very rural school in Sarawak's Fourth Division, ie Sekolah Kebangsaan Temala Kem in Baram, Miri ('the Baram school'). The transfer to the Samarahan school was effective 1 June 2010 but the applicant only reported duty on 6 July 2010. He was charged for that late reporting by the respondent but which charge (the second charge, in between that of the two charges for being absent without leave) was withdrawn. The applicant has filed this application for judicial review to quash the said decision of the respondent and for an order to reinstate him to his position together with his back wages or salaries for the period following his dismissal and to date.

THE ABSENTEEISM

**[2]** The respondent filed an affidavit in opposition in which the applicant's days of absenteeism were recorded as follows in exh TSHD2:

(a) 101 days for the year 2010 but two days were justified;

(b) 22 days for the year 2011 but 13 days were justified;

(c) 52 days for the year 2012 but 39 days were justified; and

(d) nine days for the year 2013 but eight days were justified.

**[3]** The respondent based the above days of absence for the Baram school from a record titled 'Rekod Analisis Kehadiran Guru Besar Bulan Jun hingga Mei 2010 ('exh TSHD3' to the respondent's affidavit in opposition affirmed on 14 August 2015)' prepared by one Jock Imang which was verified by its then headmaster, Johnny Harris bin Mohd Shamsudin and another document titled 'Jadual Kalendar Semakan Kes Tidak Hadir Bertugas (Cuti Hari Sabtu dan Ahad)' from 2010–2013 ('exh TSHD4' to the same affidavit). The justification for the days of absence which was allowed was in the documents collectively exhibited as TSHD5 to the same affidavit. Unlike the first mentioned exhibit

these last two mentioned exhibits were not signed and do not state who prepared them. Likewise the two documents exhibited as TSHD1 and TSHD2 where the days of absence for January–May 2010 (exh TSHD1) and July 2010–April 2013 (exh TSHD2) were without any name or the signature of the one who prepared and/or verified the same.

**[4]** The applicant in his affidavit in reply to that affidavit in opposition affirmed on 8 September 2015 raised the issue that for the record of the Baram School, it should not be verified by Johnny Harris because he was not the Headmaster then but by the District Education Officer of Baram because the former was not in the position to verify the content of the record. He also questioned the absence of a similar record for his days of absence in the Samarahan School. The applicant also annexed to his affidavit his letter dated 7 October 2013 (exh R2) where he provided an explanation for his absence and the details of which I have taken the liberty to summarise below but only in respect of the first and third charges since the second charge was withdrawn:

> (a) for the first charge of being absent for 96 days whilst holding the post of the headmaster of the Baram school.
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> The applicant said he was under emotional stress and he did fill in the leave application forms but the said forms were delivered late to the Baram's Education Department's office and his leave was not approved. The other days of absence were for attending meetings, briefings, courses or sick leave but which he said he could not prove because the school has been closed and he has no record of the same; and
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> (b) for the third charge of being absent for 88 days whilst holding the post of the Headmaster of the Samarahan school.
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> The applicant also said his absence was justified on account of basically the same facts as above with the only difference being he provided the documents to prove the same. It is to be noted that the documentary evidence accepted by the respondent saw the reduction of the number of days of absence as stated in the opening paragraph of this judgment.

**[5]** In the said letter and also in the submission of his counsel Mr Jimmy Maja, the applicant made a specific mention of his achievement when he a teaching in another school ie SK Long Sait, Baram from 2000–2004, as a headmaster of the Baram school and the Samarahan school.

**[6]** In his further affidavit in reply on 8 September 2015, he raised the issue that he was not given any counseling by the department before the decision to dismiss him as well as the fact that his wife and children were in Miri and he also had to attend to his very sick father in Kuching. He was also not given the opportunity to appeal in accordance with Schedule 3 of the Public Officers

(Conduct and Discipline) Regulations 1993 after the decision to dismiss him was made.

**[7]** The respondent, Tan Sri Haili bin Dolhan in his affidavit affirmed on 12 October 2015 reiterated that all the applicant's representations above have been taken into account and despite being able to justify certain days of absence as per the two charges mentioned earlier and above the applicant was not able to account for his 122 days of absence. The details of those days of justified absence have been provided earlier in his affidavit in opposition affirmed on 14 August 2015 at para 10 thereof.

THE RIGHT TO REVIEW

**[8]** It is trite law that this right is only accorded to the decision making process and not the decision itself. The court is entitled, upon reviewing the said process to determine if the impugned decision to dismiss was one which was reasonable. This was what NH Chan JCA said in his dissenting judgment in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 but which decision was subsequently approved by the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153. The relevant excerpt from NH Chan JCA's judgment reproduced by the Federal Court in another case ie *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605 at pp 615–616 is also done below:

> It is not for this court on an appeal, nor for any other court on the original hearing, to decide whether it would have dismissed on those facts. I think the correct test for this court on an appeal or for the High Court on the original hearing is to determine whether it was reasonable for the appellant's employers to dismiss him on those facts. I gratefully adopt the words of Phillips J in *NC Watling & Co Ltd v Richardson* [1978] ICR 1049 at pp 1056–1057:
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> ... the industrial tribunal, while using its own collective wisdom is to apply the standard of the reasonable employer; that is to say, the fairness or unfairness of the dismissal is to be judged not by the hunch of the particular tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved.
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> It has to be recognised that there are circumstances where more than one course of action may be reasonable.

**[9]** The Federal Court in *Ng Hock Chong*'s case continued to say and I paraphrased to suit the facts in this case, that the best tribunal to judge the seriousness of the misconduct of a public servant like the applicant herein is the respondent itself, being the body entrusted with and having powers over the appointment and/or dismissal of teachers like the applicant.

THE SERIOUSNESS OF THE DISCIPLINARY BREACH

**[10]** No right thinking employer, even if it is a non-human like the Government of Malaysia would and should be made to tolerate four months of absence without leave, unless accorded or on medical grounds — no matter how personally compelling the reason(s) may be, like a sick family member or enforced absence from the employee's immediate family member. Being a fellow Sarawakian, I also cannot deny and I thoroughly appreciate the applicant's argument that Baram is a very rural district with geographical impediments which does not make it an easy place for a public servant to serve. Of course public servants who served in places such as this are to be lauded for their sacrifices and the inconvenience they suffered for such service to the nation but that is not to say that these public servants of which the applicant was one should be allowed to take certain liberties with the rather severe conditions of service. Thus absence from work must only with leave or for official reasons which must strictly apply to all, without exceptions, no matter how far-flung or remote the place of service may be. For the applicant to simply just up and leave without his application for leave being approved is a conduct totally unbecoming of a public servant which rightly should neither be condoned nor tolerated.

**[11]** Though it is equally lauded that employers be compassionate to their employees, it is not in the law of employment that they must — the applicant has failed to show me where in the general orders is it required that he be first given counseling before the action to dismiss him was taken. What instead the law says is his right as a public servant was said by the Federal Court in *Ng Hock Cheng*'s case as follows at p 412 thereof:

> A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art 135 of the Federal Constitution providing that no member of such service shall be dismissed or reduced in rank except (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure provided therefor, see *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135. If the public officer succeeds in so impugning, any order of punishment including an order of dismissal can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.
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> To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally by any employment against the will of employer or employee. After all is said and done, persons in the public service categorised under art 132 of the Federal Constitution are in fact employees.

**[12]** The other irregularity raised by the applicant which was the non-verification of his days of absence in the Baram School by the Baram District Education Officer is really a non-issue because it is obvious that even that officer was not there physically in the Baram School to have personal knowledge of his days of absence. The new headmaster being physically in the school has a more direct access to the records of his absence from the school and being the person in charge of the school is the best person to do that task. Even if I were wrong in so holding, I am of the view that the said irregularity is not one of a sufficient magnitude or impact to impugn the decision of the respondent in dismissing the applicant. The other documents which were not signed or verified as mentioned earlier, do not give me any excuse to disturb the decision of the respondent to dismiss him because his 96 days of absence at the Baram School, which record of absence has been verified was so serious a breach of discipline that in itself it was enough to warrant his dismissal. This I say based on the Federal Court's decision of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 where the court held that the provisions of the Criminal Procedure Code and the Evidence Act 1950 do not apply to a disciplinary authority and 'the courts cannot introduce technicalities of a court of law' to them. The court had reproduced part of Diplock LJ's judgment in *Regina v Deputy Industrial Injuries Commissioner Ex parte Moore* [1965] 1 QB 456 at p 488 as follow:

> These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his. (Emphasis added).

**[13]** For this and all the earlier mentioned reasons, I dismiss the application for judicial review and with cost which has been graciously agreed at RM500 by the federal counsel, Ms Sandra Ko who stood in for Mr Mohd Taufik bin Mohd Yusoff when I delivered this decision.

*Application dismissed with costs of RM500.*

Reported by Dzulqarnain Ab Fatar